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93-155

May 26, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

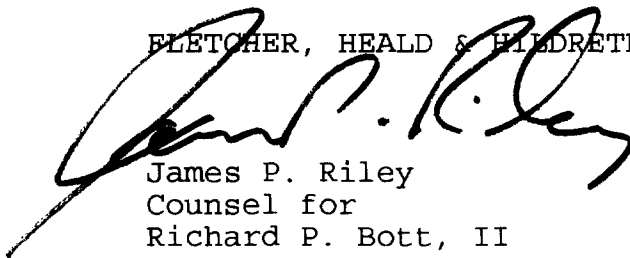
Dear Mr. Caton:

Transmitted herewith on behalf of Richard P. Bott, II is an original and six (6) copies of his Response to Answer of Mass Media Bureau pleading.

If further information is needed, please communicate with the undersigned.

Very truly yours,

FLETCHER, HEALD & HILDRETH


James P. Riley
Counsel for
Richard P. Bott, II

JPR:cej
Enclosures

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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MAY 26 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of) MM DOCKET NO. 93-155
)
RICHARD BOTT II) File No. BAPH-920917GO
(Assignor))
)
and)
)
WESTERN COMMUNICATIONS, INC.)
(Assignee))
)
For Assignment of Construction)
Permit of Station KCVI (FM),)
Blackfoot, Idaho)

To: Administrative Law Judge
Arthur I. Steinberg

**RESPONSE TO ANSWER
OF MASS MEDIA BUREAU**

Richard P. Bott, II ("Bott"), by his attorneys, hereby submits his response to the Answer of the Mass Media Bureau ("Bureau") to his "Application for Award Pursuant to the Equal Access to Justice Act" ("EAJA"). In response to the Bureau, Bott states as follows:

1. The Bureau asserts two bases for opposing Bott's application for an EAJA award. First, it argues that this proceeding was not an adversary proceeding to which EAJA applies. Second, it argues that even if this were such a proceeding the Commission's "designation of the application for hearing" was substantially justified.¹ Bott submits that the Bureau's arguments are erroneous, and that the requested award should be ordered.

¹ Answer, p. 6.

**ARGUMENT ONE: NOT AN ADVERSARY
ADJUDICATION TO WHICH EAJA APPLIES**

2. The Bureau asserts that because this proceeding involved an application to assign a construction permit, it is not a adversary adjudication within EAJA. Its argument involves a relationship between Sections 309 and 308 of the Communications Act, the language of Section 308 which embraces applications for "construction permits and station licenses, or modifications or renewals thereof," the exclusion from EAJA of adjudications for the "purpose of granting or renewing a license," 5 U.S.C.A. 504(b)(1)(C)(i), and a citation to Citizens Committee v. FCC, 436 F.2d 263 (D.C. Cir. 1970) with regard to the treatment of transfer applications.

3. Contrary to the Bureau's linkage argument, there is no basis in the Communications Act or the rules of the FCC for concluding that this proceeding is excluded, or lawfully could be excluded, from EAJA's definition of adversary adjudication. If that were the case, the Commission in adopting its rules to implement EAJA would have stated succinctly that proceedings on transfer or assignment applications are excluded, or more broadly that any proceeding initiated under Section 309 of the Communications Act is excluded.² In neither of its Orders adopting and then amending its rules to implement EAJA did the Commission hint at an exclusion of this sweep or breadth. See,

² The broad exclusion of all Section 309 proceedings is in fact the argument made by the Bureau, but it balks at explicitly stating such an overreaching argument.

Equal Access to Justice Act Rules, 88 F.C.C. 2d 1022 (1982); 2 FCC Rcd 1394 (1987).³ While proceedings commenced under Section 309 necessarily flow from the filing of an application and the designation of that application for hearing, the Commission has correctly chosen not to exclude all such proceedings from EAJA coverage under Section 1.1503(a). To have done so would not have been authorized by the terms of EAJA, and would have contravened the purposes of EAJA:

"Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. Thus, by allowing an award of reasonable fees and expenses against the Government when its action is not substantially justified, S.265 provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S.265 helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority."

House Report No. 96-1418, 5 U.S. Code Congressional and Administrative News 1980, 4991.

4. Moreover, the Bureau's reliance on Citizens Committee, supra, to link transfer applications to Section 308 of the Communications Act exposes the weakness of its position. Citizens Committee states that a transfer (or assignment) application is to be "disposed of as if the transferees were

³ The 1987 Order amended § 1.1503(a) of the Commission's Rules to include modification and suspension of licenses along with revocation as covered proceedings, but excluded no additional proceedings beyond grant or renewal of licenses.

making application for the license under Section 308 of the Act" Id. 268, emphasis supplied. Indeed, Section 310 by its express terms says just that: "Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 of this title for the permit or license in question" 47 U.S.C.A. § 310(d), emphasis supplied. In this proceeding, the Hearing Designation Order expressly stated that no further inquiry into the assignee, Western Communications, was warranted. HDO, n.8. As the HDO makes clear, the hearing was about Mr. Bott, the assignor, who already held the permit. Thus, by the terms of Section 310(d)(2) this proceeding was not a Sections 308/309 proceeding. Bott was not in this proceeding seeking a permit (or license) or renewal thereof. Far from seeking a permit, he was seeking to assign one at no profit to himself. Without support in fact and law, the Commission refused to permit him to do so without a hearing, and structured the hearing so as to place Mr. Bott and his permit in jeopardy. Whether the Commission chose to say it had designated the case for hearing under Section 309 or Section 312 (revocation) of the Communications Act is immaterial to the inclusion of this proceeding within EAJA.

5. The Bureau also suggests that this was not adversary adjudication because it was "a fact-finding inquiry, which sought to determine whether the . . . application should be granted." Again, the Bureau argues, without saying so, for a blanket exclusion from EAJA of all application-related adjudications.

After all, if a hearing is not, at least in part, a fact-finding inquiry one wonders what it is?⁴ The Commission here chose the path of adjudication, stated that it was to be represented by counsel (HDO, para. 20), and counsel representing the Commission took positions adverse to Bott (as the Commission itself had in the HDO).

6. Finally, with respect to inclusion of this proceeding within EAJA, the Bureau ignores altogether par. 15 of the HDO. Bott's efforts in this proceeding were as much directed to defending against a \$250,000 forfeiture (an amount two and one-half times the maximum sale price for the KCVI permit) as to securing an order permitting assignment of the KCVI permit. That forfeiture would have arisen from Bott's making of a false statement, and in the HDO the Commission had already found (incorrectly, and with no basis whatsoever) that Bott had made the false statement. It is truly extraordinary to now find the Bureau asserting that this was not adversary adjudication as defined by EAJA.

**ARGUMENT TWO: SUBSTANTIAL
JUSTIFICATION**

7. The Bureau argues, against the law and the entire record of this proceeding from pre-designation pleadings to the Summary Decision, that "the Commission's designation . . . was

⁴ There are surely means to conduct fact-finding inquiries without hearing designations, and the Commission uses such means. Even in contested application proceedings the Commission will by correspondence seek further information or clarification of previous filings. It did not do so here.

substantially justified" (Answer, p. 6) and that "the Commission was justified in instituting the . . . proceeding." (Answer, p. 4). The Administrative Law Judge's Summary Decision shows clearly that this is not so. See, in particular, paras. 32-35 thereof.

8. Even if, *arguendo*, the Commission had been justified in designating the proceeding, to pursue the proceeding beyond the point that it became clear that the alleged basis for the hearing did not exist terminated any "substantial justification." Leeward Auto Wreckers, Inc. v. N.L.R.B., 841 F.2d 1143 (D.C. Cir. 1988). The Bureau in this proceeding opposed Bott's effort to obtain reconsideration by the Commission,⁵ opposed Bott's petition for certification to the Commission,⁶ and opposed Bott's motion to delete issues,⁷ even though while doing so the Bureau was aware that no evidence existed of the alleged perjury by Bott described in para. 9 of the HDO. See, Bureau "Response to Request for Admission" filed July 20, 1993.

9. The Bureau also knew that the law permitted a sale by Bott of his unbuilt permit at no profit without the need for justification by Bott of his decision to sell. Eagle 22, Ltd., 7 FCC Rcd 5295 (1992); 47 CFR § 73.3597(c)(2). Thus, only if Bott had committed the disqualifying act of perjury incorrectly found against him in the HDO could the assignment not be approved. In

⁵ Opposition filed July 8, 1993.

⁶ Opposition filed July 27, 1993.

⁷ Opposition filed July 21, 1993.

that situation, Bott would be deprived of the permit by revocation and have nothing to assign.

10. Bott's position is clear: there was no basis - no substantial justification - for the hearing designation. Even if the Commission committed an innocent error in misreading allegations of Radio Representatives, Inc. in pre-designation pleadings as statements by Bott, innocent error is not substantial justification. But, again assuming arguendo that there was a substantial justification for designation, it was unreasonable for the Bureau, as the Commission's representative, to pursue the proceeding. The determination of substantial justification is to be on the "basis of the administrative record, as a whole, which is made in the adversary proceeding," 5 USCA § 504(a)(1). There is nothing in the record to which the Bureau can point which justifies the designation for hearing or the pursuit by the Bureau of this case to the point of trial and Summary Decision.

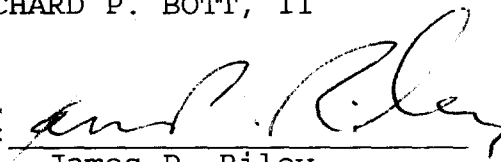
CONCLUSION

The Award applied for by Richard P. Bott, II should be granted. This proceeding was clearly adversary adjudication not excluded from EAJA, and pursuit of the proceeding by the Commission was without substantial justification.

Respectfully submitted,

RICHARD P. BOTT, II

By:



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His Attorneys

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Date: May 26, 1994

CERTIFICATE OF SERVICE

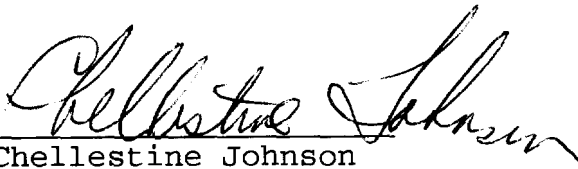
I, Chellestine Johnson, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that copies of the foregoing "Response to Answer of Mass Media Bureau" were sent this 26th day of May, 1994, by first-class United States mail, postage prepaid, to:

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